Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JON ECHEVARRIETA,
Petitioner,

vs.

THE CITY OF RANCHO PALOS VERDES, a Municipal Corporation; THE CITY OF RANCHO PALOS VERDES CITY COUNCIL,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEALS
SECOND APPELLATE DISTRICT
DIVISION FOUR

PETITION FOR WRIT OF CERTIORARI

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88 pp

QUESTIONS PRESENTED

This case presents rarely litigated questions on view ordinances and the takings issue:

Does the City of Rancho Palos Verdes' enforcement of a view ordinance which changes long established state property and nuisance laws by requiring the destruction of Petitioner's thirty year old trees to grant a view to another property owner, constitute a taking in violation of the Fifth and Fourteenth Amendments of the United States constitution?

and

Does the City of Rancho Palos Verdes' view ordinance go too far in its forty year retroactive reach and its intolerance for existing lawful non-conforming uses, thus violating the Fifth and Fourteenth Amendments of the United States Constitution?

PARTIES TO THE PROCEEDINGS

Petitioner herein, Jon Echevarrieta is the Petitioner and tree owner and the Plaintiff below. Respondents are City of Rancho Palos Verdes, A Municipal Corporation and the City of Rancho Palos Verdes City Council.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully seeks certiorari to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division Four, entered in this case on January 3, 2001 and certified for publication on January 18, 2001.

OPINIONS BELOW

The January 3, 2001 decision of the Court of Appeal of the State of California reported at 86 Cal.App.4th 472. is reproduced herein as Petitioner's Appendix A.

The March 21, 2001 order by the California Supreme Court denying review appears as Petitioners Appendix B.

The trial court's order on Petitioner's Writ of Mandate entered by the Superior Court of California, County of Los Angeles on November 19, 1999, in this same action is reproduced herein as Petitioner's Appendix F.

Finally, the Administrative decision rendered by the City of Rancho Palos Verdes View Restoration Commission and approved by the City of Rancho Palos Verdes City Council in the form of Resolution 98-21, is reproduced herein as Petitioner's Appendix G.

JURISDICTION

The Court of Appeal denied Petitioner's timely Petition for Rehearing on January 30, 2001. (See Appendix D.)

The California Supreme Court denied Petitioner's timely Petition for Review on March 21, 2001 and on April 23, 2001, the decision of the Court of Appeal of the State of California for the Second Appellate District became final. (See Remittitur, Appendix E.)

Based on the above facts, this Court has jurisdiction pursuant to 28 U.S.C. § 12257(a) because this petition seeks review of a final judgment of a state court which has decided the important federal question of Petitioner's entitlement to just compensation under the United States Constitution in a way that conflicts with other relevant decisions of this court.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides that:

> "nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United

States Constitution provides that:

> "Section1 . . . nor shall any State deprive any person of life, liberty or property without due process of law."

THE CITY ORDINANCE

The City of Rancho Palos Verdes Ordinance 17.02.040, at 2 a. through f. is attached hereto as Appendix H.

STATEMENT OF THE CASE

This action concerns Respondent City of Rancho Palos Verdes' ("the City") adoption and enforcement of a view ordinance. The effect of the ordinance is that Petitioner will lose three mature trees and will not be compensated for the loss of his trees.

In codifying the original ballot measure Proposition M, the City simply made a mistake: the Ordinance fails to acknowledge the loss of trees and to provide a fair and rational method of compensation for the tree owners' loss of trees. This has resulted in an unfair, city-wide removal of mature trees, forcing tree owners throughout the City to lose their property for the benefit of a few view seekers.

As a result, throughout the city there are

now homes with ravaged, bare, exposed yards consisting largely of stumps.

A. THE ORDINANCE

The ordinance, as applied by the City of Rancho Palos Verdes View Restoration Commission ("VRC") and the City of Rancho Palos Verdes City Council, will require that three of Petitioner's thirty year old pine trees be reduced to five foot stumps, thus killing the trees and destroying the park-like enclave of privacy, peace and quiet that Petitioner has cultivated and created since he purchased the newly created lot in 1964.

To fully understand the magnitude of the reach and effect of the City of Rancho Palos Verdes view ordinance 17.02.040 one must go back to a time when the Palos Verdes peninsula consisted primarily of rolling hills of coastal sage and chaparral.

In 1964, at the time of the creation of the lots in question, all of the lots were graded and barren of landscaping. In those early years residents were encouraged to landscape their properties and plant trees.

Now, years later, the City of Rancho Palos Verdes, whose very name ironically means "Ranch of Green Trees" in Spanish, has reversed its

position and declared that all trees over 16 feet in height which block a view and which did not exist at the time of the creation of the lot must be either trimmed or removed upon application for a view permit under Ordinance 17.02.040.

Throughout the City hundreds of mature trees have been removed–leaving countless homeowners with barren, exposed yards with large tree stumps.

B. THE CONSEQUENCES OF THE CITY'S APPLICATION OF THE ORDINANCE

The City of Rancho Palos Verdes ("City") has issued a resolution which requires that Petitioner "top" three of his thirty year old pine trees which range in height from 40 to 60 feet, to the level of the view applicant's pad. This means that the trees will be reduced to five foot tall stumps and will die.

The view applicant, Petitioner's back yard neighbor, is required to pay for the cost of topping and trimming if Petitioner consents, and to pay for replacement foliage consisting of not more than 20 to 25 one gallon "low growing shrubs."

If Petitioner does not consent, then the City will enter his property, top the trees leaving five foot stumps and bill Petitioner for the work.

C. PETITIONER SHOULD BE COMPENSATED FOR THE LOSS OF HIS TREES

Petitioner contends that the City's application of the view ordinance violates the takings clause of the United States constitution because:

1. The ordinance defeats Petitioner's reasonable expectations under the state's property laws by forcing Petitioner to bear the burden of the City's view policy by removing his trees without just compensation; and

2. The ordinance goes too far in its retroactive reach and it's regulation of use.

REASONS WHY THE WRIT SHOULD ISSUE

This case is appropriate for review because the opinion rendered by the appellate court in this matter holds that a municipality's removal or destruction of mature forty year old trees is equivalent to such other zoning regulations as density controls, building usage, lighting and parking conditions.

If allowed to 'stand, the appellate court's holding will enable municipalities to exercise their police powers to effect physical takings of private property under the guise of zoning. Such a ruling

controverts not only established takings analysis but also laws regarding retroactive application of ordinances and legal non-conforming uses.

A. THE APPELLATE COURT'S HOLDING CONFLICTS WITH THE PRINCIPLES ENUNCIATED BY THIS COURT IN *LUCAS v. SOUTH CAROLINA COASTAL COMMISSION*

When Petitioner purchased a newly created tract of land forty years ago and then proceeded to landscape the bare land with trees and other foliage, he could not have foreseen that the settled law of quiet enjoyment of property, California Civil Code §829 (which provides that a fee owner of land has the right to the surface and to everything permanently situated beneath or about it), and the general rule in California that landowners do not have a natural right to air, light or an unobstructed view (*Pacifica Homeowners' Association v. Wesley Palms Retirement Community et al.*, 178 Cal. App.3d 1147, 1151 (1986); *Katcher v. Home Savings & Loan Assoc.*, 245 Cal.App.2d 425, 429-430 (1966) would all be overturned and preempted by a local Rancho Palos Verdes view ordinance.

Since this court's decision in *Lucas v. South Carolina Coastal Commission*, 505 U.S.1003 (1992), a municipality is required to identify the "background principles of nuisance and property law that prohibit" the uses intended by a property owner whose property is subject to a new regulation. In order for the municipality to fairly claim that the view ordinance takes nothing, it must identify the relevant state property and nuisance principles which proscribe Petitioner's use. (*Lucas, supra*, 1031.)

In setting forth these principles, this Court in *Lucas*, was affirming and clarifying the position of this Court in past decisions, such as that enunciated in Justice Stewart's concurring opinion in *Hughes v. Washington*, 389 U.S. 290, 297, 298 (1967).

In *Hughes*, a pre-*Lucas* case, where a landowner held title to accretions to her ocean front property under a pre-statehood Federal grant, and was deprived of title to same by reason of a Washington State constitutional provision which provided that such ocean accretions belonged to the state, the court stated that Washington State, instead of proceeding by eminent domain, simply legislated a retroactive transformation of private property into public property without paying for the privilege of doing so.

> "As is so often the case when a State exercises its power to make law, or to regulate . . . pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does." (*Hughes*, 298)

What the City has done here is to order that Petitioner either remove his trees, or submit to a court order authorizing the City to enter Petitioner's property to abate a nuisance and "top" his trees, leaving five foot stumps, or in the words of the Rancho Palos Verdes City Council, "telephone poles," standing.

As in *Lucas* at 1031, in order for the City to fairly claim that the view ordinance takes nothing, it must identify the relevant state property and nuisance principles which proscribe Petitioner's use. The only justification put forth by the City is its right to exercise its police powers for the aesthetic benefit of the community as a whole pursuant to *Kucera v. Lizza*, 59 Cal. App 4th 1141 (1997).

The right of the City to legislate community aesthetics is not questioned here. However, to the extent that the ordinance constitutes a sudden

change in state law, unpredictable in terms of the relevant precedents, and when the impact of that change is to deprive Petitioner of property or rights that were legally his previous to the change in law, a taking occurs. (See *Hughes*, 297, 298) The case of *Kucera v. Lizza* held only that a view ordinance which sought to preserve and perpetuate views was a valid exercise of the City's police power, it did not decide the takings issue.

It is well settled that under California law, there is no right to a view. In *Peter B. Venuto v. Owens-Corning Fiberglas Corporation*, 22 Cal. App. 3d 116 (1971), where Plaintiff Venuto sought to have Defendant Owens-Corning's activities declared a nuisance, claiming that the smoke from Defendant Owens-Corning's factory obscured his view, the court held that obstruction to view is not encompassed within the definition of nuisance:

> ". . .the rule articulating that the mere obstruction of view or the mere interference with the passage of light and air by a building or structure does not amount to a nuisance applies equally to an obstruction or interference caused by the emission of smoke . . . provided such emission does not otherwise constitute a nuisance."

Similarly in *Katcher v. Home Savings & Loan*

Assoc., 245 Cal.App.2d 425, the court stated that:

> "It has long been established in this state that a landowner has no easement over adjoining land for light and air in the absence of an express grant or covenant" *(Katcher*, 429)

Thus Petitioner's property was not subject to a view easement or to any restrictions on landscaping.

The above view, as articulated by the California court, is also the clear majority rule in other jurisdictions. (See Nebraska: *Kruger v. Shramek*, 5 Neb. App. 802 (1997), citing Missouri: *44 Plaza, Inc. v. Gray-Pac Land Co.*, 845 S.W.2d 576 (Mo. App. 1992); Washington: *Collinson v. John L. Scott, Inc.*, 55 Wash. App. 481 (1989); Iowa: *Mohr v. Midas Realty Corp.*, 431 N.W.2d 380 (Iowa 1988); Texas: *Scharlack v. Gulf Oil Corporation*, 368 S.W.2d 705 (Tex. Civ. App. 1963); Indiana: *Wolf et al. v. Forcum et al.*, 130 Ind. App. 10 (1959).)

Given the long established and uncontroverted law that no landowner has a natural right to a view, Petitioner herein was justified in investing his money and time in an extra large lot with a slope and landscaping his lot with the trees which now flourish in his back yard.

The City's action pursuant to the ordinance interferes with Petitioner's reasonable investment expectation that he would enjoy the trees that he had spent over thirty years cultivating and nurturing from saplings to maturity–the privacy the trees create, the energy savings that the trees facilitate; the protection from sun and wind that they provide. The City's resolution calls for replacement foliage consisting of 20-25 one gallon shrubs–not an adequate replacement for mature 40-60 foot trees.

Upon one property owner's application for a view permit, not only would the City forcibly create a view easement over another's private property, but it would also declare all view obstructing trees over 16 feet in height on that property a nuisance because they violate a city ordinance.

There is no precedent in California law which declares that healthy trees, even if they obstruct a view, are a nuisance. The City's ordinance, together with the case of *Kucera v. Lizza*, changes this law by declaring Petitioner's trees a nuisance, subject to destruction by the City unless Petitioner removes the trees on his own.

Insofar as it constitutes a sudden change in established state law, the City's view ordinance flies in the face of the principles upheld in *Hughes* and *Lucas*, and as applied to Petitioner, takes his

trees without compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

B. THE APPELLATE COURT'S OPINION THAT THE ORDINANCE IS A LEGITIMATE EXERCISE OF THE CITY'S POLICE POWER CONFLICTS WITH ESTABLISHED FEDERAL PRECEDENTS REGARDING RETROACTIVE LEGISLATION

The City's view ordinance seeks to create views that existed at the time of the creation of the lots. In Petitioner's case, the retroactive reach of the ordinance is nearly forty years. The retroactive reach of the ordinance and the attendant height limitations endanger all mature tree growth within the City of Rancho Palos Verdes.

This court, in *Eastern Enterprises v. Apfel* 524 U.S. 498,522 (1998), set forth the analytic criteria for determining when the retroactive application of a law constitutes a taking: (a) what is the economic impact of the regulation; (b) how does it interfere with reasonable investment backed expectations; (c) is the character of the government action such that fairness requires

compensation, and in determining the fairness of the government action, (d) what is the distance into the past of the retroactive reach of the ordinance and (e) what is the magnitude of the liability imposed. *Eastern Enterprises, supra,* at 523-524.

The Appellate Court recited the above referenced factors, but then failed to make any analysis in accordance with those factors and ignored the two factors set forth in *Eastern* as a test for the fairness of a government's actions. After stating the relevant factors, the Appellate Court ignored its own words and merely concluded that there was no "per se" taking. (Appendix A, 11-12).

Petitioner argues that he will suffer an adverse economic impact: he will lose the value of his trees and the will be required to begin landscaping his backyard all over again, nurturing saplings to maturity. The 20-25 one gallon plants which the City ordered as replacements are hardly substitutes for mature forty year old, 40 to 60 foot trees.

Petitioner further argues that his reasonable expectations are defeated: he invested the time and money in cultivating his trees for forty years.

And Petitioner finally argues that the character of the government action is to either

force him to remove his trees or send agents in with chains saws to "top" his trees.

The Court of Appeals made no determination on whether the destruction of trees pursuant to the retroactive application of a view ordinance constitutes a taking except to state that landowners with trees are allowed to keep foliage at the height that existed on the effective date of the ordinance until application is made to restore a view, and therefore the government action is fair since there is no *automatic* retroactive reach of the ordinance. (Appendix A, 16.)

In Petitioner's case, and of necessity in all cases in the City of Rancho Palos Verdes, the City will, upon application for a view permit, resolve to remove mature trees. This is because the City seeks to create views that existed at the time of the creation of the lot–and there were virtually no trees in the City of Rancho Palos Verdes at the time of the creation of the lots. The retroactive reach of the ordinance is thus automatic once application is made for a view permit.

This case will be one of only a few published decisions on the takings issue with respect to enforcement of view ordinances and it will not have addressed any of the elements in classical takings analysis. There are no answers to the questions:

1. What is the economic impact of the regulation on Petitioner and all those tree owners similarly situated;

2. How does the ordinance interfere with Petitioner's and other tree owners' reasonable investment backed expectations–the forty years of nurturing and cultivating trees to maturity; and

3. What is the character of the government action? How fair is it for a municipality to order that trees be removed and replaced with one gallon shrubs?

4. What is the retroactive reach of the ordinance? Is reaching back to recreate views that existed forty years ago going too far?

5. What is the magnitude of liability imposed on Petitioner and those similarly situated? What is the value of three forty year old pine trees. What is the value of the hundreds of trees that have already been taken by the city?

6. And finally, are Petitioner and those similarly situated being forced to bear the burden of the City of Rancho Palos Verdes' view preservation and restoration policy, which burden should be borne by the public as a whole?

Petitioner and those similarly situated deserve answers to these questions–answers

which the Appellate Court fails to give.

C. THE APPELLATE COURT'S OPINION THAT THE ORDINANCE IS A LEGITIMATE EXERCISE OF THE CITY'S POLICE POWER CONFLICTS WITH ESTABLISHED PRECEDENTS REGARDING ZONING AND NON-CONFORMING USES

The court of appeals not only declined to make a takings analysis with respect to the ordinance's retroactive application, but characterized the ordinance as a "traditional land use regulation," insisting that Petitioner was only required to "trim" his trees (Appendix A, 14), much like "building set backs, parking and lighting conditions and landscaping requirements." (Appendix A, 13.)

As applied by the City, the ordinance seeks to remove a pre-existing non-conforming use, in derogation of established law that a change in use does not render illegal a prior lawful nonconforming use. (See *Browning-Ferris Industries v. Maryland Heights*, 747 F. Supp. 1340, 1348 (1990), U.S. District Court, Eastern District of Missouri and *Edmonds v. County of Los Angeles*, 40 Cal. 2d 642, 651 (1953).)

Petitioner asserts that his trees are a prior lawful non-conforming use, and should either be protected from the retroactive reach of the Ordinance or should be adequately compensated for if removal is required.

The court of appeals in this case dismissed Petitioner's argument that his trees constituted a prior lawful non-conforming use by stating that:

> "Appellant cannot show he has a vested right to foliage of a certain height. . . . " (Appendix A, 14.)

The Appellate Court's statement would be correct if Petitioner was arguing for compensation for the right to grow trees to a certain height.

But this is not what Petitioner is arguing. Petitioner is arguing that he will suffer economic loss equal to the value of his trees, that his legitimate investment backed expectations have been thwarted by an unfair and overreaching government action–the creation of views that have not existed for forty years.

In other words, Petitioner is arguing a taking of his trees, not his right to grow tall trees.

The City's and the Appellate Court's assertion that the view ordinance is a zoning ordinance and merely regulates use dismisses

long established zoning regulation analysis, which holds that "The rights of users of property as those rights existed at the time of the adoption of a zoning ordinance are well recognized and have always been protected." A new zoning ordinance does not generally render illegal a prior lawful nonconforming use. (*Browning-Ferris Industries, Inc. v. Maryland Heights,* 747 F. Supp. 1340 (1990, U.S. Dist., Eastern District of Missouri); *Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal.4th 533, 551-552; *Edmonds v. County of Los Angeles* (1953) 40 Cal.2d 642, 651.)

Just as a compensable taking would occur if an ordinance placing a one story height limit on buildings required all non-conforming buildings to remove anything above the first story, so the issuance of a view permit pursuant to the View Ordinance which suddenly requires the removal of Appellant's non-conforming trees constitutes a compensable taking.

A city may not effect a taking through an overly zealous effort to eliminate an existing nonconforming use. Instead of violating due process by applying an ordinance retroactively a city must pursue two constitutionally equivalent alternatives:

> "It can eliminate the use immediately by payment of just compensation, or it can require removal of the use

without compensation following a reasonable amortization period."

Metromedia, Inc. v. City of San Diego (1980) 26 Cal.3d 848, 881; See also *E.B. Elliot Adv. Co. v. Metropolitan Dade County,* 425 F2d 1141, 1155 (5th Cir. 1970) and *Outdoor Graphics v. City of Burlington,* 103 F.3d 690, 695 (8th Cir. 1996).

The City in its retroactive application and enforcement of the view ordinance exhibits an unconstitutional intolerance for non-conforming uses: due process requires that the City either pay or be more patient in seeking change by regulation.

Appellant's trees are a prior lawful non-conforming use, and should either be protected from the retroactive reach of the Ordinance or, if removal is required, should be adequately paid for with just compensation.

CONCLUSION

In its enforcement of the view ordinance the City of Rancho Palos Verdes proposes to cut three mature trees down to five foot stumps, leaving them to die. As a result of the City's actions Petitioner's backyard environment will be destroyed along with Petitioner's reasonable investment expectations.

Instead of paying for change or waiting to phase in change, the City seeks to regulate it's citizens into a forced, immediate change. In doing so, the City's application of the ordinance goes too far. The City is:

> "in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (*Pennsylvania Coal Co. v. Mahon* 260 U.S. 393, 415 (1922).)

Petitioner respectfully requests that this court review this case and determine whether view ordinances such as Rancho Palos Verdes Ordinance 17.02.040 do in fact violate the Fifth and Fourteenth Amendments to the United States Constitution by going too far.

DATED: June 15, 2001

Respectfully submitted,

ROBERT HAMPTON ROGERS
Counsel of Record

SULLIVAN, WORKMAN & DEE, LLP

APPENDIX A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

COURT OF APPEAL - SECOND DIST.
F I L E D
JAN 03 2001
JOSEPH A. LANE . . . . . .Clerk
. . . . . Deputy Clerk

JON ECHEVARRIETA,
Plaintiff and Appellant

v.

THE CITY OF RANCHO PALOSVERDES, et al.,
Defendants and Respondents.

B138366
(Super. Ct. No. YS006446)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jean E. Matusinka, Judge. Affirmed.

Sullivan, Workman & Dee and Robert Hampton Rogers for Plaintiff and Appellant.

Carol W. Lynch, City Attorney of the City of Rancho Palos Verdes; Richards, Watson & Gershon, T. Peter Pierce and Gregory M. Kunert for Defendants and Respondents.

Jon Echevarrieta (appellant) appeals from a judgment entered in favor of respondents the City of Rancho Palos Verdes (the City) and the City of Rancho Palos Verdes City Council (the City Council) after the trial court denied appellant's petition for writ of mandate. At issue is a "view protection" ordinance of the City. We affirm the trial court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Ordinance

Voters in the City approved Proposition M on November 7, 1989. It was codified in section 17.02.040 of the Rancho Palos Verdes Municipal Code (hereinafter referred to as the Ordinance), and was most recently amended in January 1997.

In pertinent part, the Ordinance prohibits residents of the City from significantly impairing a view by permitting foliage to grow to heights exceeding certain height limitations. If foliage in existence already exceeds those height limitations, the person whose view is impaired must first attempt to informally resolve the matter with the person who owns the foliage, and if that fails, may apply for a "view restoration permit." Hearings on the application for the permit are conducted by a View Restoration Commission (VRC), a committee of seven members appointed by the City Council. The VRC may grant the permit only if certain specified findings are made. If the VRC orders any foliage trimmed or removed, or replacement foliage is ordered planted, the costs are to be borne by the permit applicant. Any interested party may appeal the VRC's decision to the City Council.

The Application Process

Since 1966, Norbert Keilbach has lived on Greve Drive in the City. His home faces south towards the Pacific Ocean and Catalina Island. Appellant lives on Ganado Drive, on a slope directly below Keilbach's home. Appellant has several trees which are near the border of his property and Keilbach's which purportedly block

Keilbach's view of the ocean and Catalina Island.[1] Appellant purchased his property in 1964. The trees did not exist prior to the establishment of either Keilbach's or appellant's lots.

In February 1997, Keilbach filed an application with the City in order to compel appellant to trim trees that interfered with his view.

On May 1, 1997, a public hearing was held in connection with the view restoration application. Both appellant and Keilbach appeared. At the conclusion of the hearing, the VRC adopted Resolution No. 97-5, requiring that appellant remove the three pine trees, and to trim the tops of five other trees, at the expense of the applicant, Keilbach.

On May 16, 1997, appellant appealed the VRC's decision to the City Council. The City Council heard the appeal at its public meeting on July 1, 1997, and remanded the matter to the VRC for further consideration of the effect that trimming the trees would have on appellant's privacy.

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[1] There are eight trees which are the subject of the dispute: 2 pine trees which measure approximately 40 feet, 1 pine tree which measures approximately 60 feet, 1 pine tree which measures approximately 20 feet, 1 ash tree measuring approximately 40 feet, 1 olive tree which measures 40-50 feet, 1 ornamental plum tree which measures 20 feet and 1 scrub oak tree which measures 40-50 feet.

The VRC held another public hearing on the application on October 2, 1997. At the conclusion of this hearing, the VRC ordered its staff to prepare for adoption at the next meeting a resolution requiring appellant to trim his trees.

On November 6, 1997, the VRC approved Resolution No. 97-22. This resolution required appellant to trim eight of his trees but also required Keilbach to plant a barrier of no more than 20 to 25 low-growing shrubs between his property and appellant's to mitigate appellant's privacy concerns.

Appellant appealed this decision to the City Council. On March 17, 1998, the City Council heard the appeal during its public meeting.

On April 7, 1998, the City Council adopted Resolution No. 98-21, affirming the VRC's approval of the view restoration permit application and requiring appellant to trim eight of his trees. Appellant then filed this lawsuit in Superior Court.

Proceedings in Superior Court

Appellant filed his "Petition for writ of mandate; complaint for declaratory relief, taking[,] spot zoning and attorney's fees" on June 17, 1998. In his complaint, he alleged that the City and the City Council abused their discretion in affirming the decision of the VRC to issue the view restoration permit, that the City and the City

Council failed to grant him a fair trial, that the affirmance of the approval of the view restoration permit constituted a taking without just compensation in violation of the Fifth Amendment, and that "[b]y its enactment of the view restoration ordinance, the City has actively engaged in a species of illegal spot zoning," that is, the "unreasonable, arbitrary and discriminatory" classification of property by the enactment of unreasonable and arbitrary regulations pertaining to certain uses or classifications of property. He sought declaratory relief on two grounds: (1) that the ordinance is unconstitutional because it conflicts with state easement law and violates individual property rights and (2) that the view blockage cannot be declared a public nuisance. He also sought an award of attorney fees.

The matter came on for trial on May 4, 1999. Appellant failed to appear and the court ordered the matter dismissed. Appellant's subsequent motion to set aside the dismissal was granted and the matter was re-set for trial on August 30, 1999. The matter was ultimately submitted on October 12, 1999, and on November 19, 1999, the trial court denied the petition. It ruled, in pertinent part, "The view restoration ordinance is a valid exercise of the city's police power and is not preempted by state law. [¶] In light of the whole record, there is substantial evidence which supports the findings contained in Resolution 98-21 and the findings that support the City Council's decision. [¶] Uncontradicted

evidence in the record show[s] that the plaintiff had reasonable notice of the City Council's public hearings regarding his property and was given reasonable opportunity to be heard. Plaintiff's due process rights were not violated. [¶] *[Kucera v. Lizza* (1997) 59 Cal.App.4th 1141]." Appellant filed a notice of appeal on January 5, 2000.

On March 3, 2000, the City obtained from the Superior Court a warrant authorizing entry upon appellant's property "for the sole and exclusive purposes of trimming, culling, and lacing trees and foliage." On March 10, 2000, appellant obtained a 90-day stay of execution upon the warrant. Appellant filed a petition for writ of supersedeas on June 8, 2000. We denied that petition on June 9, 2000.

DISCUSSION

On appeal, appellant addresses five issues: (1) the trial court erred in relying upon *Kucera v. Lizza;* (2) the ordinance violates the takings clause; (3) retroactive application of the ordinance deprives him of due process; (4) the ordinance is deceptive and uncertain; (5) as applied, the ordinance impermissibly expands the City's police power. We first address issues (1) and (5).

1. Kucera v. Lizza and the City's Police Power

In *Kucera v. Lizza, supra,* 59 Cal.App.4th 1141, the Court of Appeal considered the validity

of an ordinance of the Town of Tiburon similar to the ordinance presented here. The stated purpose of the Tiburon ordinance was to establish "the right of persons to preserve views or sunlight which existed at any time since they purchased or occupied a property from unreasonable obstruction by the growth of trees" and to establish a process to achieve restoration of views and sunlight. (Tiburon Muni. Code, § § 15.1.A and B.) In accord with the provisions of the ordinance, the Kuceras petitioned for informal dispute resolution with respect to trees located on the downhill lot across the street, property owned by Lizza. The Kuceras claimed the trees obstructed their views of the San Francisco Bay and the Marin County mainland. Lizza refused to participate in the process. The Kuceras filed a complaint in superior court seeking to compel restoration of their views and for abatement of a public nuisance. The trial court entered judgment in favor of Lizza concluding that the ordinance was unconstitutional and void because it was preempted by state law and was an arbitrary and unreasonable exercise of the police power.

The Court of Appeal reversed: "It is well settled that the state may legitimately exercise its police powers to advance aesthetic values.... The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. [Citations.] . . . [¶ We hold the Tiburon ordinance is directed toward a valid police power goal--to

preserve views and sunlight. Tiburon's choice of regulating obstructing trees and tree growth obviously bears a reasonable relationship to the achievement of those goals. [Citation.]" (*Id.* at pp. 1148-1149, internal quotation marks omitted.)

Here, appellant contends that the Ordinance does not state a valid purpose because it states only that "the peace, health, safety and welfare of the community will be served by the adoption of this section." We disagree.

The ballot measure which was approved by the voters states the purposes of the Ordinance as follows: "The hillsides of the City constitute a limited natural resource in their scenic value to all residents of and visitors to the City. The hillsides provide potential vista points and view lots. The City's General Plan recognizes these natural resources and calls for their protection. The public health, safety and welfare of the City require prevention of needless destruction and impairment of these limited vista points and view lots....[¶] Specifically, this Ordinance: [¶] 1. Protects, enhances and perpetuates views available to property owners and visitors because of the unique topographical features of the Palos Verdes Peninsula. These views provide unique and irreplaceable assets to the City and its neighboring communities.... [¶] 2. Defines and protects finite visual resources by establishing limits which construction and plant growth can attain before encroaching onto a view. [¶] 3. Insures that the

development of each parcel of land or additions to residences or structures occur in a manner which is harmonious and maintains neighborhood compatibility and the character of contiguous sub-community development as defined in the General Plan." These purposes were reprinted in the View Restoration Permit Guidelines and Procedures issued by the City.

Enacting the ordinance for these purposes is a clearly a legitimate exercise of the city's traditional police power. (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 886; *Kucera, supra*, 59 Cal.App.4th at p. 1149.) To the extent that the trial court cited *Kucera* for this proposition, it did not err.

2. The Takings Issue

We agree that the *Kucera* case is not dispositive of appellant's takings claim. The opinion specifically remanded the matter for further proceedings on this issue: "The takings authorities cited by the parties are, of course, not directly pertinent. This is a facial challenge and, while it is hard to imagine on this record how compliance with the ordinance and resultant tree trimming might result in an unconstitutional taking, any such argument will have to await a remand and further proceedings." (*Id.* at p. 1154.) Here, appellant contends that the ordinance is invalid "as applied," raising the taking issue.

The Takings Clause of the Fifth Amendment to the federal Constitution provides "[N]or shall private property be taken for public use, without just compensation." "The aim of the Clause is to prevent the government 'from forcing some people alone to bear public burdens which, in all fairness' and justice, should be borne by the public as a whole.' *(Armstrong v. United States* [(1960) 364 U.S. 40, 49].)" *(Eastern Enterprises v. Apfel* (1998) 524 U.S. 498, 522.) Similarly, the California Constitution at article I, section 19, provides that "[p]rivate property may be taken or damaged for public use only when just compensation ... has first been paid. . . ."

A party challenging a governmental action as an unconstitutional taking bears a substantial burden. *(Eastern Enterprises, supra,* at p. 523.) Not every destruction or injury to property by the government has been held to be a taking. *(Armstrong, supra,* at p. 48.) The process for evaluating the constitutionality of a governmental action involves an examination of its "justice and fairness," for which there is no set formula, and the inquiry is "essentially ad hoc and fact intensive." *(Eastern Enterprises, supra,* at p. 523.) Several factors which have been held to be particularly significant are: (1) the economic impact of the regulation; (2) its interference with reasonable investment backed expectations; and (3) the character of the governmental action. *(Eastern Enterprises, supra,* at pp. 523-524.)

There are two types of regulatory action which have been adjudicated to be "per se" takings without the necessity of weighing the public interest advanced in support of the restraint. Those are: (1) where the property owner has suffered a physical invasion of his property and (2) where the regulation denies all economically beneficial or productive use of land. *(Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015.)

Contrary to appellant's arguments, the Ordinance does not itself compel a physical invasion of appellant's property. Rather, it is appellant's refusal to comply with Resolution No. 98-21, after ample notice and opportunity to correct, that has occasioned the threat of the City's entry onto the property. It does not therefore, rise to the level of a physical invasion. *(Yee v. City of Escondido* (1992) 503 U.S. 519, 527; *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 7, 12; *Duffy v. City of Long Beach* (1988) 201 Cal.App.3d 1352, 1358.)

Likewise, we find unavailing appellant's attempt to analogize this case to *Lucas v. South Carolina Coastal Council, supra,* 505 U.S. 1003 as a denial of his "reasonable investment backed expectations." In *Lucas*, the purchaser of two lots zoned for residential use was later precluded by state legislation from erecting *any* permanent habitable structures on the lots. Unlike the plaintiff in *Lucas*, appellant here is not deprived of

any significant economically beneficial use of his land.

Here, while the City has imposed limitations on the height of pre-existing foliage, it is a legitimate exercise of police power which does not rise to the level of a taking. Contrary to "per se" takings, "traditional land-use regulations" such as the imposition of minimal building setbacks, parking and lighting conditions, landscaping requirements, and other design conditions "have long been held to be valid exercises of the city's traditional police power, and do not amount to a taking merely because they might incidentally restrict a use, diminish the value, or impose a cost in connection with the property. [Citations.]" *(Ehrlich v. City of Culver City, supra,* 12 Cal.4th at p. 886; *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 518 ["[A] zoning action which merely decreases the market value of property does not violate the constitutional provisions forbidding uncompensated taking or damaging. . . ."].) "The denial of the highest and best use does not constitute an unconstitutional taking of property. [Citation.] 'Even where there is a very substantial diminution in the value of land, there is no taking. . . .' ([*Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016, 103 6].)" *(Ramona Convent of the Holy Names v. City of Alhambra* (1993) 21 Cal.App.4th 10, 23.)

It is even questionable whether there has been a diminution in the value of the land. Appellant cites the damage to his property as his loss of privacy and "utility saving cooling shade."

Appellant cannot show he has a vested right to foliage of a certain height or to a fixed amount of utility charges. In addition, appellant has not been ordered to destroy his trees, but simply to trim them. The City's resolution provides that the cost of the tree removal is to be borne by Keilbach and that reasonable replacement shrubbery is also to be purchased by him. If any of the trees or shrubs that is ordered trimmed dies within one year, Keilbach is to bear the expense of a replacement tree or shrub. Therefore, appellant is being fairly compensated for any damage to his trees.

While appellant cherishes his park-like privacy, the regulation of tree heights throughout the city may indirectly increase the property's value, as the city becomes known for one which has scenic vistas. (See *HFH, Ltd. v. Superior Court, supra, 15* Cal.3d at pp. *520-521.)* As for the loss of his privacy, the VRC made a specific finding, after visiting Keilbach's property, that there was no unreasonable infringement of appellant's privacy "since the subject trees limit but do not totally eliminate all viewing onto the foliage owner's property from the applicant's property."

Accordingly, we find no taking as contemplated within the Fifth Amendment of the United State Constitution or article 1, section 19 of the California Constitution.

3. *Due Process Claims*

a. *Retroactive Application*

Appellant contends that retroactive application of the ordinance amounts to irrational and arbitrary action. He also argues that the ordinance allows view seekers to exact retribution against foliage owners and that the VRC did not appropriately balance the interests of the two property owners. In support of these argument, he cites *Eastern Enterprises v. Apfel, supra, 524 U.S. 498.*

In *Eastern*, a company that formerly was in the coal mining business left that industry. Several years later, the Coal Industry Retiree Benefits Act was enacted, providing for assigned benefits to retirees in the coal industry. The effect of this Act was to impose $50 to $100 million worth of liability on the company based on its activities 30 to 50 years earlier. *(524 U.S.* at pp. 503, 516-517.)

The company sued, claiming there was a taking and a violation of Due Process rights. (524 U.S. at pp. 517, 529.) In concluding that the company's claims had merit, the Supreme Court

noted that retroactive legislation is generally disfavored. It presents problems of unfairness because it can deprive citizens of legitimate expectations and upset settled transactions. (*Eastern, supra,* at pp. 532, 533.) The Court concluded that the length of time that the Coal Act reached back to impose liability on the company and the magnitude of the liability raised substantial fairness question.

Here, there is no automatic retroactive reach of the ordinance. Homeowners are allowed to keep foliage at the height it existed on the effective date of the Ordinance. It is only when another homeowner applies for a view restoration permit that the inquiry begins whether the foliage must be trimmed to a lower height. (See discussion, *infra,* on vagueness claim.)

In addition, there is no showing that the ordinance was applied in an arbitrary or irrational manner. (*United States v. Carlton* (1994) 512 U.S. 26, 32.) The ordinance requires first resort to informal dispute resolution and provides for noticed hearings and rights of appeal. Keilbach and the City Council duly followed all the required steps. There is no factual basis for appellant's contention that the City or the VRC acted with an improper motive. In fact there is no reason given by appellant for Keilbach's actions against appellant other than view restoration.

b. *Uncertainty*

Appellant contends that the ordinance is so unclear that it violates due process. He cites *Ross v. City of Rolling Hills* (1987) 192 Cal.App.3d 370, 375, for the tests for vagueness challenge as follows: (1) the statute must not forbid nor require the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application; (2) the language must be definite enough to provide a standard of conduct as well as a standard by which adjudicating agencies can ascertain compliance; (3) the words used should be well known enough to enable affected persons to understand and correctly apply them; they must be either of long standing usage in the profession or industry involved or those which have be interpreted by the courts, or those which the meaning of which may be determined by knowledge and experience, or those which may be made reasonably certain by reference to common law or legislative history. (*Id.* at p. 375.)

The *Ross* case itself notes, "'[A] substantial amount of vagueness is permitted in California zoning ordinances' in order to permit delegation of broad discretionary power to administrative bodies. [Citations.]" (*Id.* at p. 376, citing *Novi v. City of Pacifica* (1985) 169 Cal.App.3d 678, 682.)

The Ordinance provides at section (B)(3): "3. Foliage Obstruction. No person shall significantly impair a view from a viewing area of a lot by permitting foliage to grow to a height exceeding: [¶] a. The height determined by the view restoration commission through issuance of a view restoration permit under Section 17.02.040 (C)(2) of this chapter; or [¶] b. If no view restoration permit has been issued by the view restoration commission, a height which is the lesser of. [¶] 1. The ridge line of the primary structure on the property; or [¶] ii. Sixteen feet. [¶] If foliage on the property already exceeds the provisions of subdivisions (i) and (ii) of Section 17.02.040(B)(3) of this chapter on the effective date of this section, as approved by the voters on November 7, 1989, and significantly impairs a view from a viewing area of a lot, then notwithstanding whether any person has sought or obtained issuance of a view restoration permit, the foliage owner shall not let the foliage exceed the foliage height existing on the effective date of this section (November 17, 1989). *The purpose of this paragraph is to ensure that owners of foliage which violates the provisions of this paragraph on the effective date of this section shall not allow the foliage to increase in height. This paragraph does not 'grandfather' or otherwise permit such foliage to continue to block a view.*"[2] (Italics added.)

---

[2] The last two sentences were not contained in the original Proposition M. The first of these sentences was added when Proposition M was codified, the last one added when the ordinance was amended in 1997.

Appellant contends that the final paragraph of this section is so deceptive and uncertain as to violate due process principles, as demonstrated by the minutes of the City Council meeting held on July 1, 1997. In particular, appellant argues that it is unclear whether paragraph (3)(b) applies when no VRC determination has been made or to all foliage in existence at the time of enactment.

Section (3)(B) can be fairly read without resort to other materials as follows: If a property owner had trees exceeding 16 feet prior to November 17, 1989, impairing the view of a neighbor, the property owner is prohibited from letting that foliage grow any higher whether or not the neighbor has obtained a view restoration permit. The final sentence means that if the neighbor does eventually seek a permit, the trees in excess of 16 feet can be ordered to be trimmed. We do not find this section to be either deceptive, unclear or uncertain.

Appellant also contends that section (C)(2)(f) of the Ordinance, which permits the VRC to recommend removal and replacement of trees is vague and confusing because there is no language indicating the consequences that befall a non-consenting foliage owner. That section provides: "The view restoration commission may impose such reasonable conditions or restrictions on the approval of a view restoration permit as may be found to be appropriate or necessary to protect the

public health, safety or welfare or the foliage owner's reasonable enjoyment of his or her property. Such conditions or restrictions may include, but are not limited to: (1) requiring the complete removal of the subject foliage when the commission finds that the trimming, culling, lacing or reducing of that foliage to sixteen feet or the ridge line is likely to kill the foliage, threaten the public health, safety and welfare, or will destroy the aesthetic value of the foliage that is to be pruned or reduced in height, provided that the property owner consents to the removal; and (2) requiring replacement of such foliage when the commission finds that removal without replacement will cause a significant adverse impact on: (a) the public health, safety, and welfare, (b) the privacy of the property owner, . . . provided that the property owner consents to the replacement."

We find no vagueness in this section either. The VRC is empowered to impose whatever reasonable conditions or restrictions as are appropriate or necessary "as may be found to be appropriate or necessary to protect the public health, safety, or welfare" in the event that a property owner does not consent to removal or replacement. There is nothing unconstitutional about this delegation of broad discretionary power to the VRC and the City. (*Ross, supra,* 192 Cal.App.3d at p. 376.)

DISPOSITION

The judgment of the superior court is affirmed.

NOT TO BE PUBLISHED

HASTINGS, J.

We concur:

VOGEL (C.S.), P.J.

EPSTEIN, J.

APPENDIX B

Court of Appeal, Second Appellate District,
Division Four - No. B138366
S095170

SUPREME COURT
F I L E D
March 21 2001

Frederick K. Ohlrich Clerk

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JON ECHEVARRIETA,
Plaintiff and Appellant,
v.
CITY OF PALOS VERDES, et al.,
Defendants and Respondents.

Petition for review DENIED.
Kennard, J., did not participate.

GEORGE

Chief Justice

APPENDIX C

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

COURT OF APPEAL-SECOND DIST.
FILED
JAN 18 2001
Joseph A. Lane Clerk
B. Pantoja Deputy Clerk

JON ECHEVARRIETA,
Plaintiff and Appellant,
v.
CITY OF LOS ANGELES, et al.,
Defendant and Respondent.

B138366
(Super. Ct. No. YS006446)
(Jean E. Matusinka, Judge)

ORDER CERTIFYING OPINION
FOR PUBLICATION

THE COURT:*

Good cause appearing, it is ordered that the opinion in the above entitled matter, filed January 3, 2001, be published in the official reports.

/S/	/S/	/S/
*VOGEL (C.S.), P.J.	EPSTEIN, J.	HASTINGS, J.

APPENDIX D

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

COURT OF APPEAL-SECOND DIST.
FILED
JAN 30 2001
Joseph A. Lane Clerk
J. Guzman Deputy Clerk

JON ECHEVARRIETA
Plaintiff and Appellant,
v.
THE CITY OF RANCHO PALOS VERDES, et al.,
Defendants and Respondents.

B138366
(Super. Ct. No. YS006446)

ORDER DENYING PETITION
FOR REHEARING AND MODIFYING OPINION
[NO CHANGE IN JUDGMENT]

THE COURT:*

The petition for rehearing is denied. It is ordered that the opinion filed January 3, 2001, and certified for publication on January 18,

2001, be modified as follows:

1. On page 2, the first sentence of the third paragraph is modified to read as follows: "In pertinent part, the Ordinance prohibits residents of the City from significantly impairing a view by permitting foliage to grow in excess of certain height limitations."

2. On page 6, in the first sentence of the first paragraph, the words "addresses five issues" shall be deleted and the words "makes the following contentions" shall be inserted in their place.

3. On page 6, in the third sentence of the second paragraph, the word "on" shall be inserted before the word "property."

4. On page 11, the last sentence in the first paragraph is omitted.

5. On page 12, in the first full sentence, beginning with "In support" the word "argument" shall be omitted and the word "arguments' inserted in its place.

There is no change in judgment.

/S/	/S/	/S/
*VOGEL (C.S.), P.J.	EPSTEIN, J.	HASTING, J.

APPENDIX E

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION 4

Los Angeles County Superior Court
111 North Hill Street
Los Angeles, CA 90012

Jon Echevarrieta
vs.
City of Rancho Palos Verdes
B138366
Los Angeles County No. YS006446

*** **REMITTITUR** ***

I, Joseph A. Lane, Clerk of the Court of Appeal of the State of California, for the Second Appellate District, do hereby certify that the attached is a true and correct copy of the original order, opinion or decision entered in the above-entitled cause on January 3, 2001 and that this order, opinion or decision has now become final.

Respondents to recover costs on appeal.

Witness my hand and the seal
of the Court affixed at my
office this

April 23 2001
Joseph A. Lane, Clerk

by:_____
Deputy Clerk

cc: All Counsel
File

APPENDIX F

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 11/19/99 DEPT. SW B
HONORABLE JEAN E. MATSINKA, JUDGE
HONORABLE JUDGE PRO TEM
NONE DEPUTY SHERIFF
D. LUNA DEPUTY CLERK
ELECTRONIC RECORDING MONITOR
NONE REPORTER

9:00 am YS006446 Plaintiff N/P
Counsel

JON ECHEVARRIETA
VS
CITY OF RANCHO PALOS VERDES, ET AL.
Defendant
Counsel N/P

NATURE OF PROCEEDINGS:

ORDER ON SUBMITTED MATTER

In the cause heretofore submitted on 10-12-99 the court now rules as follows:

The court has read and reviewed the briefs submitted by the parties; Volumes 1 and 2 of the certified administrative record and numerous cases and statutes. The plaintiff's petition for writ of mandate and declaratory relief are denied.

The view restoration ordinance is a valid exercise of the city's police power and is not preempted by state law.

In light of the whole record, there is substantial evidence which supports the findings contained in Resolution 98-21 and the findings supported the City Council's decision.

Uncontradicted evidence in the record show that the plaintiff had reasonable notice of the City Council's public hearings regarding his property and was given reasonable opportunity to be heard. Plaintiff's due process rights were not violated.

Kucera v Lizza; 59 CA 4th 1141 (97).

MINUTES ENTERED
11/19/99
COUNTY CLERK

APPENDIX G

RESOLUTION NO. 98-21

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF RANCHO PALOS VERDES AFFIRMING THE APPROVAL OF VIEW RESTORATION PERMIT NO. 29 TO TOP, TRIM, AND/OR REMOVE TREES AT 30327 GANADO DRIVE.

WHEREAS, on February 18, 1997, Mr. and Mrs. Norbert Keilbach, who own property located at 3632 Greve Drive, in the City of Rancho Palos Verdes, filed an application for View Restoration Permit No. 29 ("Permit") to top, trim and/or remove several trees on the property located at 30327 Ganado Drive. ("the subject property"), owned by Mr. Jon Echevarrieta ("the foliage owner"); and

WHEREAS, pursuant to the requirements of the Municipal Code, notice of the hearing before the View Restoration Commission ("Commission"), along with copies of the Staff report, were mailed to the applicant and the foliage owner on April 1, 1997, 30 days in advance of the hearing; and

WHEREAS, on May 1, 1997, after all voting members of the View Restoration Commission had visited the site, the Commission held a duly noticed public hearing, to consider the request, at which time, all interested parties were given an opportunity to

be heard and present evidence, the View Restoration Commission made all necessary findings, and approved View Restoration Permit No. 29 by adopting V.R.C. Resolution No. 97-5; and

WHEREAS, on May 16, 1997, within the fifteen day appeal period, Mr. Jon Echevarrieta, the foliage owner, appealed the Commission's decision to the City Council; and

WHEREAS, after notice issued pursuant to the requirements of the Municipal Code, the City Council held a public hearing on July 1, 1997, at which time all interested parties were given an opportunity to be heard and present evidence on the notice of appeal; and

WHEREAS, after hearing all public testimony, and discussing the issues, the City Council remanded VRP No. 29 back to the View Restoration Commission: and

WHEREAS, on October 2, 1997, after all voting members of the View Restoration Commission had revisited the site, the Commission held a duly noticed public hearing to consider the request, at which time, all interested parties were given an opportunity to be heard and present evidence, the View Restoration Commission made all necessary findings, and approved View Restoration Permit

No. 29; and

WHEREAS, on November 6, 1997, the View Restoration Commission adopted V. R. C. Resolution No. 97-21 as amended in the attached conditions outlined in Exhibit A; and

WHEREAS, on November 21, 1997, within the fifteen day appeal period, Mr. Jon Echevarrieta, the foliage owner, appealed the Commission's decision to the City Council; and

WHEREAS, after notice issued pursuant to the requirements of the Municipal Code, the City Council held a public hearing on March 17, 1998, at which time all interested parties were given an opportunity to be heard and present evidence on the notice of appeal; and

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF RANCHO PALOS VERDES DOES FIND, DETERMINE, AND RESOLVE AS FOLLOWS:

Section 1: The applicant at 3632 Greve Drive has a view, as defined by Section 17.02.040 of the City's Development Code, which includes the Pacific Ocean and Catalina Island.

Section 2: The applicant's viewing area, as defined by Section 17.02.040 of the City's

Development Code, includes: the living room, dining room, and an outdoor patio area at the rear of the property at 3632 Greve Drive because these areas all share the same view of the ocean and Catalina Island.

Section 3: The subject property at 30327 Ganado Drive contains four (4) large Pine trees, one (1) Ash tree, one (1) Ornamental Plum tree, one (1) Olive tree, one (1) Scrub Oak tree, that significantly impair the applicant's view.

Section 4: The applicant has complied with the early neighbor consultation process and has shown proof of cooperation on their part to resolve conflicts, as evidenced by the letter dated February 13, 1997 and receipt for registered mail sent to the foliage owner at 30327 Ganado Drive.

Section 5: Based on evidence provided by the applicant, the subject trees at 30327 Ganado Drive significantly impair a substantial portion of the applicant's primary view. Two (2) Pine trees measure approximately 35 to 40 feet, one (1) Pine tree measures approximately 60 feet, one (1) Pine tree measures 18-20 feet, the Ash tree measures approximately 35-40 feet, the Olive tree measures roughly 40-50 feet, the Ornamental Plum tree measures 20 feet, and the Scrub Oak tree measures roughly 40 to 50 feet tall. All trees exceed the ridge line of the primary

structure of the foliage owner's property, which is approximately 26 feet in height as measured from the existing building pad grade. The ridgeline of the primary structure is located at a higher elevation than the 16 foot elevation measured from the existing base of each tree.

Section 6: The subject property is located less than one thousand (1,000) feet from the applicants property.

Section 7: The applicant's and foliage owner's properties were created in 1963. There is a solis report in the file demonstrating that the area was covered with brush and that the subject trees did not exist prior to the establishment of the lots.

Section 8: The recommended topping, trimming, and/or removal of the subject trees will not cause an increased or unreasonable infringement on the privacy of the foliage owner since the subject trees limit but do not totally eliminate all viewing onto the foliage owner's property from the applicant's property. Further, replacement shrubs are required to be planted at the applicant's expense to allow for additional screening.

Section 9: The foliage owner questioned the legality of the applicant's second story deck. Staff researched the issue and found that the

Planning Department had approved the Site Plan Review for the deck, however, the building plan check for the project had expired. Prior to the start of the second VRC review, the applicant resolved the matter with the City's Building and Safety Department and a final building permit was issued.

Section 10: Based on the field review of the City's Geotechnical Consultant, the recommended removal of the subject Pine trees, without replacement of such foliage, could increase slope erosion. As a result, the City's Geotechnical Consultant has advised that: the Pine tree stumps and the root systems should remain intact and replacement shrubs shall be planted, as identified in Condition No. 2 of attached Exhibit "A", to further support the slope.

Section 11: The topping, trimming, and/or removal of the subject trees as identified in Conditions 1 through 7 of attached Exhibit "A", is necessary in order to restore the applicant's view.

Section 12: Pursuant to Section 15300 of the California Environmental Quality Act the proposed project is categorically exempt under Class 4 of that section because the work required to restore the applicants view does not include the removal of scenic and mature trees

as identified by the City of Rancho Palos Verdes General Plan (Visual Aspects; Figure 41).

Section 13: The time within which the judicial review of the decision reflected in this Resolution, if available, must be sought is governed by Section 1094.6 of the California Code of Civil Procedure.

Section 14: For the foregoing reasons and based on the information and findings included in the Staff Report, Minutes and other records of proceedings, which are attached hereto by reference, the City Council of the City of Rancho Palos Verdes hereby denies the appeal, thereby upholding the View Restoration Commission's decision with modifications to the conditions of approval attached as Exhibit A, and approves View Restoration Permit No 29 to top, trim, and/or remove trees at 30327 Ganado Drive in order to restore the view from 3632 Greve Drive, as requested and provided for in the conditions outlined in the attached Exhibit "A" and the attached plot plan diagram.

PASSED, APPROVED, AND ADOPTED on the 7th day of April 1998.

/s/ BARBARA J. FERRARO
Mayor

ATTEST:

/s/ JO PURCELL
City Clerk

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss
CITY OF RANCHO PALOS VERDES)

I, Jo Purcell. City Clerk for the City of Rancho Palos Verdes, hereby certify that the above Resolution No. 98-21 was duly and regularly passed and adopted by the said City Council at a regular meeting held on April 7, 1998.

_____
City Clerk

EXHIBIT "A*
CONDITIONS OF APPROVAL
VIEW RESTORATION PERMIT NO. 29

1. Pine Trees No. 1, 2, & 3 : Remove Pine trees No. 1, No. 2, and No. 3, with the consent of the foliage owner. However, if the foliage owner does not grant the authority to remove the trees, then the crowns of all three trees shall be topped to the level of the applicants pad and maintained in such a manner. Additionally, the applicant shall pay for the planting of a mid-slope privacy barrier. The barrier shall consist of a variety of plants (not more than 20 to 25 plants), to be selected by the foliage owner from a list provided by Staff. Final selection and placement of the plant materials shall be made by the foliage owner, reviewed by the City Arborist, and approved by the Director of Planning, Building, and Code Enforcement. The City Arborist shall provide the foliage owner with all the information that will assist the foliage owner in selecting the appropriate plantings, including but limited to, the distance of the plantings from the top of the slope, the natural mature height of the selected foliage and the anticipated frequency and costs of maintenance of the foliage.

2. To prevent increased slope erosion, the stumps and the root systems of Pine trees No. 1, 2, and 3 should remain intact and the area shall be replanted with Acacia Redolens, or a similar plant species approved by the Director of Planning, Building and Safety, and Code Enforcement. Any newly planted foliage shall be maintained at a height that will not impair a view from another property in the future.

3. Pine Tree No. 4: Pine tree No. 4 shall be topped and trimmed from a point which does not exceed a diagonal line drawn from a point at the top of the transitional slope at 3632 Greve Drive, and extending to the ridgeline of the residence at 30327 Ganado Drive, and maintained in such a manner.

4. Ash Tree: The Ash tree shall be topped and trimmed from a point which does not exceed a diagonal line drawn from a point at the top of the transitional slope at 3632 Greve Drive, and extending to the ridgeline of the residence at 30327 Ganado Drive, and maintained in such a manner.

5. Olive Tree: The Olive tree shall be topped and trimmed from a point which does not exceed a diagonal line drawn from a point

at the top of the transitional slope at 3632 Greve Drive, and extending to the ridgeline of the residence at 30327 Ganado Drive, and maintained in such a manner.

6. Ornamental Plum Trees: The Ornamental Plum shall be topped and trimmed from a point which does not exceed a diagonal line drawn from a point at the top of the transitional slope at 3632 Greve Drive, and extending to the ridgeline of the residence at 30327 Ganado Drive, and maintained in such a manner.

7. Scrub Oak Tres : The Scrub Oak shall be topped and trimmed from a point which does not exceed a diagonal line drawn from a point at the top of the transitional slope at 3632 Greve Drive, and extending to the ridgeline of the residence at 30327 Ganado Drive, and maintained in such a manner.

8. Pursuant to Section V-A-4 of the VRP Guidelines and Procedures, any tree or shrub that is removed shall be cut flush to the ground leaving the root systems and stumps in place.

9. If any tree or shrub that is ordered to be culled, laced, or trimmed as specified in this permit, dies within one year of the

initial work being performed due to the performance of the work, the applicant or any subsequent owner of the applicant's property shall be responsible for providing a replacement tree or shrub to the foliage owner. The replacement foliage shall be provided in accordance with the specifications described in Section V-E of the VRP Guidelines and Procedures.

10. No sooner than one year after the initial trimming is completed, City Staff shall report to the Commission as to the adequacy of the maintenance schedule, as well as the foliage owner's ability to maintain the foliage in compliance with these conditions of approval. The Commission shall consider the Staff report and determine if a public hearing to amend the conditions is necessary. If the Commission determines that a hearing is necessary, then a hearing will be held pursuant to Section V.I. of the VRP Guidelines and Procedures.

11. The applicants should, not later than 30 days after approval of this permit, present to the City, at least one itemized estimate to carry out the aforementioned work. Such estimate is to be supplied by a licensed landscape or licensed tree service contractor, acceptable to the City, which

provides insurance certificates in a form acceptable to the City, and shall include all costs of cleanup and removal of debris. In addition, the applicant shall pay to the City an amount equal to the City selected estimate and such funds shall be maintained in a City trust account until completion of work.

12. The foliage owners shall select a contractor from the estimates provided by the applicants or another licensed firm of their choice subject to approval by the City, to perform the required work. However, the foliage owner shall only be reimbursed for the amount of the lowest bid submitted by the applicant. if the foliage owner chooses to do the required work himself, then the foliage owner shall not be compensated from the trust account and the amount in the trust account shall be refunded to the applicant.

13. The applicant may reduce the scope of the trimming required by this Permit by giving the City and the foliage owner written notice of such decision within 30 days of this approval. The applicant shall deposit funds to the City in a trust account in an amount sufficient to cover the remaining work. However, trimming or removal of the

vegetation which the applicants have chosen to eliminate would then require an entirely new View Restoration application and fee.

14. The applicant may withdraw his view restoration request and his trust account funds if the applicant does so within five (5) days after the applicant has sent the estimate required herein. In the event that the applicant withdraws his/her request in a timely manner, the foliage owner is not required to perform the work specified by this Permit and this Permit is of no further force and effect.

15. The foliage owner shall, no later than 90 days after the Notice of Approval (First Notice) is mailed, complete the work to the extent required by this Permit, and shall maintain the vegetation to a height that will not impair a view from another property in the future as specified in these Conditions of Approval.

16. The City shall reimburse the foliage owner from the City's trust account, not later than 30 days after receipt of the appropriate billing and the satisfactory completion of the required work specified by this Permit, as verified by City Staff, in an amount not to exceed the amount of

the applicant's trust account.

17. If the required work as specified herein is not completed within the stipulated time periods, then the City of Rancho Palos Verdes will authorize a bonded tree service to perform the foliage removal work at the subject property at the foliage owner's expense. In the event that the City is required to perform the work at the foliage owner's expense, the City shall reimburse the applicant from the City trust account not later than 30 days after the City completes the work.

18. Subsequent to the trimming or removal of the foliage, Staff will document the restored view for future reference by submitting to the applicant, foliage owner, and Director of Planning, Building and Code Enforcement, photographs of the restored view taken from the applicant's viewing area along with a "Documentation of Existing Foliage or View"

APPENDIX H

CITY OF RANCHO PALOS VERDES ORDINANCE

17.02.040 View preservation and restoration.

The residents of the city or Rancho Palos Verdes, by the adoption of this section, have made a finding that the peace, health, safety and welfare of the community will be served by the adoption of this section and by the regulations prescribed herein.

* * * * *

2. Restoration of Views Where Foliage is a Factor.

a. Any resident owning a residential structure with a view may file an application with the city for a view restoration permit. The applicant shall file with the application proof that the applicant consulted, or attempted to consult, with the property owner whose foliage is in question. The applicant shall pay a fee for the view restoration permit as established by resolution of the city council.

b. The application shall be submitted to the view restoration commission. Written notice of the time and place for the hearing on the application shall be sent to the applicant and the property owner(s) of the foliage involved at least thirty calendar days prior to the meeting of the commission. Commission members shall inspect the site prior to the public hearing. Only view

restoration commission members who make a site inspection may participate in the public hearing.

c. In order for a view restoration notice to be issued, the commission must find:

i . The applicant has complied with the early neighbor consultation process and has shown proof of cooperation on his/her part to resolve conflicts;

ii. Foliage exceeding sixteen feet or the ridge line of the primary structure, whichever is lower, significantly impairs a view from the applicant's viewing area, whether such foliage is located totally on one property, or when combined with foliage located on more than one property;

iii. The foliage to be removed is located on property, any part of which is less than one thousand feet from the applicant's property line(s);

iv. The foliage significantly impairing the view did not exist, as view impairing vegetation, when the lot from which the view is taken was created;

v. Removal or trimming of the foliage will not cause an unreasonable infringement of the privacy of the occupants of the property upon which the foliage is located;

vi. For property located within the boundaries of the Miraleste recreation and park district, the commission shall also find the removal or trimming of the foliage strikes a reasonable balance between meeting the purposes of Section 17.02.040 of this chapter, as set forth in

the ordinance approved by the voters on November 7, 1989, and preserving the historical developments of the Miraleste recreation and park district area with a large number of trees.

d. Should the commission make findings requiring issuance of a view restoration permit, the director shall send a notice to the property owner to trim, cull, lace or otherwise cause the foliage to be reduced to sixteen feet or the ridge line of the primary structure, whichever is lower, or such limit above that height which will restore the view. The property owner will have ninety calendar days to have the foliage removed. The applicant shall be responsible for the expense of the foliage removal and/or replacement ordered pursuant to this subsection only to the extent of the lowest bid amount provided by contractors licensed to do such work in the city of Rancho Palos Verdes and selected by the applicant. If after ninety calendar days the foliage has not been removed, the city of Rancho Palos Verdes will authorize a bonded tree service to trim, cull, lace or remove the identified foliage at the owner's expense. After the initial trimming, culling, lacing or removal of the foliage, the owner, at the owner's expense, shall be responsible for maintaining the foliage so that the view restoration required by the view restoration permit is maintained.

e. To the extent legally permissible, trees or foliage on property owned by any governmental entity, except the city and the Miraleste

recreation and park district, shall be subject to view restoration control, as per the provisions of this section; except, that the foliage shall be trimmed or removed thirty calendar days following issuance of the notice. Trees and/or foliage located on city property, or in the public right-of-way, as defined in Chapter 17.96 (Definitions), shall be subject to view restoration control, as per the provisions of this section, pursuant to the city tree review permit procedure contained in Section 17.76. 100 (City tree review permit.)

f. The view restoration commission may impose such reasonable conditions or restrictions on the approval of a view restoration permit as may be found to be appropriate or necessary to protect the public health, safety or welfare or the foliage owner's reasonable enjoyment of his or her property. Such conditions or restrictions may include, but are not limited to: (1) requiring the complete removal of the subject foliage when the commission finds that the trimming, culling, lacing or reducing of that foliage to sixteen feet or the ridge line is likely to kill the foliage, threaten the public health, safety and welfare, or will destroy the aesthetic value of the foliage that is to be pruned or reduced in height, provided that the property owner consents to the removal; and (2) requiring replacement of such foliage when the commission finds that removal without replacement will cause a significant adverse

impact on, (a) the public health, safety and welfare, (b) the privacy of the property owner, (c) shade provided to the dwelling or the property; (d) the energy-efficiency of the dwelling; (e) the health or viability of the remaining landscaping, or (f) the integrity of the landscape plan, provided that the property owner consents to the replacement.

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